Louisiana Law Review

Volume 40 | Number 2
Symposium: Comparative Negligence in Louisiana
Winter 1980

The Comparative Negligence and the Duty/Risk Analysis

Alston Johnson

COMPARATIVE NEGLIGENCE AND THE DUTY/RISK ANALYSIS

*Alston Johnson**

According to a Chinese proverb, victory has a thousand fathers, but defeat is an orphan. This observation can be made with telling effect as to the doctrine that a tort claimant is wholly barred from any recovery whatsoever by his own carelessness. Known as contributory negligence, this concept is unquestionably one of the most discussed, most criticized, and most imperfectly understood doctrines of judicial creation. In view of the manner in which the concept has been rationalized and applied over the century and a half of its existence, this is readily understandable. But contributory negligence has played an important role in the development of tort law. Thus, whether, and in what manner, it should be replaced by comparative negligence is a matter that requires extended comment.

THE BIRTH AND GROWTH OF CONTRIBUTORY NEGLIGENCE

The birth of contributory negligence as an absolute bar to a victim's recovery is attributed to *Butterfield v. Forrester*,[1] an 1809 English decision. The defendant, while engaged in some repairs to his building, blocked off a portion of the roadway but left sufficient room for passage. Plaintiff was riding his horse through the street about dusk and was injured when he collided with the temporary barricade. The jurors were instructed that "if a person riding with reasonable and ordinary care could have seen and avoided the obstruction"[2] and if plaintiff was not so riding, they should return a verdict for defendant. This they did, a decision which was affirmed upon appeal in a per curiam opinion.[3]

The decision is susceptible of two possible interpretations. The court may have meant simply that defendant's conduct would not subject him to liability if the impediment was so trivial that it could

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*Professor of Law, Louisiana State University. The incisive comments and suggestions of colleagues are gratefully acknowledged, especially those made by Emeritus Professor Wex S. Malone and Assistant Professor Martha Chamallas.

1. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). There may, however, have been some lesser known predecessors. *See* Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).

2. 11 East at 60, 103 Eng. Rep. at 927.

3. It is said that the opinion "could be wired at night letter rate without extra charge." Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151 (1956).

readily be avoided by any ordinary walker or rider.[4] If defendant's conduct was not actionable, then it follows that the issue of the plaintiff's contributing negligence was irrelevant.

But there is another and different explanation. The decision might be treated as an announcement that whatever may have been the conduct of the defendant, carelessness on the part of the plaintiff himself would serve to defeat a recovery. This alternate approach would be attractive to a nineteenth-century judge since it would spare him the necessity of considering the kinds of risks (including those brought about through the inattention and carelessness of passers-by) to which the defendant's duty should be extended.

Probably such refinements did not even occur to a court at this early stage of the history of negligence. Even so, the practice of treating a victim's carelessness as a ground for the penalty of denial of recovery came to have a strong appeal to courts with the onset of the age of mass transportation and industry.[5] The economic and social climate of the time was one of intense individualism, in which each legal actor was expected to see after his own affairs and bear his own losses. A recovery of damages exacted from some emerging transportation or industrial enterprise was a matter that was viewed with a jaundiced eye in the nineteenth-century courtroom. Judges tended to view with suspicion the jurors and their generous impulses toward victims. As a result, the search for a ready means of jury control became a major concern. And it was at this point that the prospect of dismissing a damage claim as a penalty to be imposed upon the heedless victim offered its strongest allurement.

It should also be noted that the early negligence litigation centered around the tragedy of the railroad crossing. In this setting, items of claimed misbehavior by the unwary crossing victim fell readily into narrow and easily defined classes and, therefore, could be conclusively disposed of through non-suit or directed verdict. The justification for contributory negligence, then, lay more in the satisfaction of the needs of court administration than in respect for any ethical principle.[6]

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4. In today's language this is equivalent to a statement that defendant's obstruction did not amount to a public nuisance, which is defined as an unreasonable interference with the public way. BLACK'S LAW DICTIONARY 1107 (5th ed. 1979).

5. Malone, *supra* note 3, at 152-53; Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 127 (1945).

6. The earlier discussion of *Butterfield* suggested that the young horseman's failure to recover as a result of his own misbehavior could be explained without reference to the notion that he was an undeserving claimant who brought his misfortune upon himself. It might be said that the denial of recovery was prompted through compassion for Forrester's predicament rather than through distaste for young Butterfield's misbehavior. This approach was one that could readily lend itself to effective use in handling the controversies arising from mass transportation. A restraining hand

It is doubtful that in these early crossing cases the courts were cognizant of any distinction between denying recovery because both plaintiff and defendant were careless and denying recovery because defendant's duty could not be extended to the situation produced by plaintiff's own conduct. For the courts of that time, the main objective was to have available a dependable means of making sure that the jury was kept within bounds. And contributory negligence served as that dependable means of jury control.

The law of contributory negligence retained, from its history, a curious dichotomy. One was never certain in many cases whether defendant won because he was not negligent or because both defendant and plaintiff were negligent. Since the result was the same, it made little difference and detailed reasons on the point were rarely given.[7]

The Louisiana experience with contributory negligence was remarkably similar, even though the directed verdict device was not available until recently.[8] Appellate review of facts in civil cases served the same purpose of jury control.[9] It is worthy of note that the Louisiana decisions betrayed more evidence of concern lest the defendant be unfairly burdened than any interest in assuring that the victim was punished for his waywardness. The earliest Louisiana case was *Lesseps v. Pontchartrain Rail Road Co.*[10] Plaintiff's cart, powered by two mules and driven by a slave, had an unfortunate collision with defendant's train. His property having emerged decidedly the worse for the encounter, plaintiff sought damages from the railway company.

The evidence was in some conflict, but the jury rendered a verdict in plaintiff's favor. The supreme court reversed, and its reversal was expressly grounded on the fact that there was no proof that defendant was negligent:

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upon the benevolence of juries could have been imposed by the courts had they so chosen merely by acknowledging openly that the range of risks that could claim effective protection at the hands of enterprise at that time was narrow. In the railroad crossing cases, for instance, it would have been adequate for the purpose of non-suit merely to point out that the railroad's duty to sound the crossing signal cannot properly extend to those persons whose manner of approach to the track afforded little promise that they would have been alerted by the signal even if it had been given.

7. But of course if comparative negligence is to be the rule, then a distinction between the two types of cases must be made. If defendant has no duty at all, the amount by which plaintiff's recovery might be reduced because of his own negligence is irrelevant. But if both plaintiff and defendant are negligent, reduction of plaintiff's recovery is pertinent.

8. The directed verdict device was first available in civil jury trials in 1977, when article 1810 was added to the Code of Civil Procedure by Act 699.

9. LA. CONST. art. V, § 5.

10. 17 La. 361 (1841).

> Although we consider it indiscreet in the defendants to run their cars in a crowded street, at the rate the one in question was going, still as it was not unusual . . . and as great presumption and folly are proved on the slave of the plaintiff, we cannot agree to affirm the judgment. The charge of negligence and mismanagement against the engineer or conductor is not proved . . . .[11]

The *Lesseps* decision was cited soon thereafter in the more widely noted case of *Fleytas v. Pontchartrain Rail Road Co.*[12] On this occasion, plaintiff's slave had apparently fallen ill or asleep on the defendant's track and never awoke due to the unkind intervention of defendant's passing train. Plaintiff had a decision in the lower court, but it was reversed by the supreme court. Its reasons were brief and to the point: "The testimony does not show that the engineer did not act with due care."[13] Though the court later unburdened itself of *dicta* about the disposition of a case in which both parties are at fault, it is clear that this was not the matter before the court in *Fleytas*.

These "landmark" decisions, which have since been referred to as the fountainhead of contributory negligence in Louisiana, are thus ones in which the claimant's showing of negligence on the part of defendant was inadequate, and statements as to the effect of *contributing* negligence of the victim were no more than *dicta*. Rather, the court simply examined the scope of defendant's responsibility and decided that the fact-finder could not properly conclude that defendant had any responsibility under the circumstances presented to it.

Nevertheless, the doctrine of contributory negligence gained acceptance. Almost all of the cases in which it was discussed in the early years involved transportation risks, particularly those caused by railroads and street railways. In many of these cases, application of the doctrine at the appellate level resulted in reversal of judgments based on substantial verdicts in favor of plaintiffs at the trial level.[14]

It is significant that juries were prevalent during the formative years, and the result (if not the avowed objective) of resorting to the

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11. *Id.* at 365-66.

12. 18 La. 339 (1841).

13. *Id.* at 339.

14. Professor Malone notes that of the twenty-one contributory negligence cases decided in Louisiana during the formative years from 1854 to 1888, ten arose out of the operation of New Orleans street railways. All ten were jury trials, and in each plaintiff had received a substantial judgment based on the jury's verdict. In all but one, defendant was successful in achieving a reversal at the appellate level on the basis of contributory negligence. Malone, *supra* note 5, at 136-40.

device of contributory negligence was to foil a real, or supposed, tendency of the jury to make railway companies pay for the damage inflicted on the public through their operations.

From this narrow beginning and throughout the period of industrial expansion, the doctrine of contributory negligence enjoyed phenomenal growth. Both in Louisiana and elsewhere, it played an effective role in limiting the duty of employers toward their employees, and its reign in that field was ended only by legislative action.[15] It served to limit the duty of landowners toward various entrants on their land.[16] When the automobile age ushered in new transportation risks, courts applied the doctrine to those as well. But despite the wide variety of situations to which it was applied, the doctrine retained its role as a jury-control device. Jurors were commonly regarded as unduly plaintiff-minded.[17] Judges were at first apprehensive that jurors might tend to ignore negligence on the part of a plaintiff despite cautionary instructions. When the court concluded that the defendant's duty did not extend so as to protect a plaintiff who had acted as that plaintiff did, it would be dangerous to permit such a matter to go to the jury. But in order to keep it from doing so, it was much easier to say "no recovery because plaintiff was careless" than to say "no recovery because defendant was not negligent, *i.e.*, his duty does not extend to the protection of such a plaintiff."[18]

In time, however, juries fell into general disfavor in Louisiana. As a result, the importance of contributory negligence as a control

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15. *See* W. MALONE & A. JOHNSON, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE §§ 3-4 (2d ed. 1980).

16. Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 68-69 (1945).

17. This was perhaps incurably so:

> With the intrusion of the railway upon the scene came a marked change in the frame of mind of the average juryman. He quickly adopted the attitude that has characterized him ever since in claims against corporate defendants. He became distinctly and, at least for a time, incurably, plaintiff-minded.
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> It is hardly conceivable that it could have been otherwise. The mental makeup of the pioneer, the sudden shift in social and economic values, and the drama of the courtroom all combined to turn his mind in that direction. First should be remembered the provincial character of isolated peoples and their hostile suspicion of the outlander. The unproved stranger is seldom given the benefit of the doubt in such a community, and if his intrusion bodes ill for the safety of the vicinage and introduces hitherto unknown dangers for the homefolk, he can hardly expect a tender ministration at the hands of the local jury.

Malone, *supra* note 3, at 156. It has also accurately been said that "this tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries . . . ." Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934).

18. *See* Johnson, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1, 43-44 (1976).

device waned. Voices were raised for the abolition of contributory negligence, relying upon an article of the Louisiana Civil Code.[19] But by then the doctrine was firmly rooted, and the effort came to naught.

Indeed, use of the doctrine became more pervasive. The suggestion that the victim had contributed, even slightly, to his own harm invited an easy disposition of the case in the defendant's favor at the appellate level. Such a disposition made unnecessary any consideration of the scope of the duty allegedly breached by the defendant.[20] The result of extensive resort to contributory negligence in Louisiana was thus to convert difficult defendant-duty questions into easy victim-fault questions.

But growing awareness by judges that the slightest fault on the part of the victim served utterly to destroy his entire claim must have been a thought that stirred uneasily within the judicial conscience, and this uneasiness probably increased as the impress of individualism gradually subsided. Various devices were developed to circumvent the effects of contributory negligence without destroying the basic rule. A plaintiff at fault could still recover if defendant had the last clear chance to avoid the injury[21] or if plaintiff was only momentarily forgetful[22] or faced with a sudden emergency.[23] Careless children were often judged by a less stringent standard when they were victims,[24] and indeed even adults seemed held to a less rigorous standard as plaintiffs than they might have been as defendants.[25] In instances in which the facts were indecisive, there was a

19. LA. CIV. CODE art. 2323. The primary voice raised was that of Professor Wex Malone in his article *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 131 (1945).

20. *See, e.g.*, Jones v. Firemen's Ins. Co. of Newark, 240 So. 2d 780 (La. App. 2d Cir. 1970); Malone v. Hartford Ins. Co., 239 So. 2d 697 (La. App. 1st Cir. 1970).

21. Guilbeau v. Liberty Mut. Ins. Co., 338 So. 2d 600 (La. 1976) (pedestrian-motorist case); Belshe v. Gant, 235 La. 17, 102 So. 2d 477 (1958) (pedestrian-motorist case); Jackson v. Cook, 189 La. 860, 181 So. 195 (1938) (actual discovery of negligent plaintiff not necessary if defendant should have discovered plaintiff's peril); Rottman v. Beverly, 183 La. 947, 165 So. 153 (1935) ("discovered peril" situation); Belle Alliance Co. v. Texas & P. Ry. Co., 125 La. 779, 51 So. 846 (1910); Epperly v. Kerrigan, 275 So. 2d 884 (La. App. 4th Cir. 1973); Sistrunk v. Aetna Cas. and Sur. Co., 267 So. 2d 784 (La. App. 2d Cir. 1972). *See also* Pence v. Ketchum, 326 So. 2d 831 (La. 1976) (application of the doctrine in a non-traffic situation). *See generally* Comment, *The Last Clear Chance Doctrine in Louisiana—An Analysis and Critique*, 27 LA. L. REV. 269 (1967).

22. *See, e.g.*, Coleman v. Schafer, 317 So. 2d 645 (La. App. 4th Cir. 1975); Hailey v. LaSalle Parish Police Jury, 302 So. 2d 668 (La. App. 3d Cir. 1974).

23. *See, e.g.*, Coleman v. Schafer, 317 So. 2d 645 (La. App. 4th Cir. 1975).

24. Brantley v. Brown, 277 So. 2d 141 (La. 1973); Thibodeaux v. Fireman's Fund Ins. Co., 325 So. 2d 318 (La. App. 3d Cir. 1975); Simmons v. Beauregard Parish School Board, 315 So. 2d 883 (La. App. 3d Cir. 1975).

25. *See, e.g.*, Dupas v. City of New Orleans, 354 So. 2d 1311 (La. 1978).

strong presumption that a plaintiff would take great care for his own safety.[26] When no established exception appeared applicable, ad hoc relief from contributory negligence was available.[27] And if no relief at all was available, there were sure to be dissenting expressions of discontent with the rigidity and unfairness of the doctrine.[28]

In Louisiana and elsewhere, discontent with the absolute bar of contributory negligence grew. By judicial fiat and legislation, states began to choose a more progressive concept.[29] Why not compare the fault of a defendant and a plaintiff and reduce a plaintiff's recovery rather than bar it altogether? In a number of cases, this seemed to produce entirely satisfactory results. Discussion of such a concept naturally caused the absolute bar of contributory negligence to be re-considered and the respective advantages of the two doctrines to be re-examined.

CONTRIBUTORY NEGLIGENCE VERSUS COMPARATIVE NEGLIGENCE[30]

The wisdom of using contributory negligence rather than com-

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26. *See, e.g.*, Gallineau v. Travelers Indem. Co., 322 So. 2d 408 (La. App. 3d Cir. 1975).

27. In *Rice v. Crescent City Railroad Co.*, 51 La. Ann. 108, 24 So. 791 (1899), the temporary motorman operating the defendant's electric streetcar was blind in one eye and because of this handicap did not see the plaintiff's small child approaching the track until the car struck her. Although the child's nurse inadvertently allowed her to go upon the track, she was said to be merely "not mindful of her duty" rather than negligent. The court opined that a plaintiff's act or omission, when only a remote cause or a mere antecedent occasion or condition of the injury inflicted, is considered not to be contributory negligence. But still, it *reduced* the jury award to plaintiff stating that conduct chargeable to a plaintiff might be considered in mitigation of damages.

In *Ortolano v. Morgan's Louisiana and Texas Railroad & Steamship Co.*, 109 La. 902, 33 So. 914 (1903), plaintiffs' five-year-old son was allowed to wander onto the tracks in front of an oncoming train traveling at a high rate of speed through an area known to be heavily trafficked by pedestrians. Plaintiffs, who were very poor, had a large number of children. The court said that "where a parent . . . has done all which can reasonably be expected of one in his circumstances, he is not debarred from recovery" by placing fewer restraints on his child than would be the case of parents who were wealthier. *Id.* at 906, 33 So. at 915.

28. These are numerous. *See, e.g.*, Jackson v. Continental Cas. Co., 310 So. 2d 858, 858 (La. 1975) (Barham, J., dissenting), *denying cert. to* 308 So. 2d 438 (La. App. 3d Cir.); Eubanks v. Brasseal, 310 So. 2d 550, 554-56 (La. 1975) (Barham, J., concurring); Haas v. Southern Farm Bureau Cas. Ins. Co., 321 So. 2d 380, 385-88 (La. App. 4th Cir. 1975) (Lemmon, J., concurring; Beer, J., dissenting); Jackson v. Continental Cas., 308 So. 2d 438, 441-43 (La. App. 3d Cir. 1975) (Watson, J., concurring).

29. This development is discussed in depth elsewhere in this symposium. *See* Wade, *Comparative Negligence: Its Development in the United States and Its Current Status in Louisiana*, 40 LA. L. REV. 299 (1980).

30. In its broadest sense, contributory negligence simply describes a set of circumstances under which substandard behavior of the claimant has contributed to his ultimate harm. The term implies that substandard behavior on the part of the defen-

parative negligence, or vice versa, depends upon the reason one considers victim fault in the first place. If we consider victim fault because we want to punish the victim and demonstrate to him and others that only the careful may expect compensation for harms produced in part by their own conduct, then the rule that *any* fault will bar *all* recovery seems extreme. The lesson can as easily be taught and learned by an appropriate reduction of damages according to the causative role played by the victim's substandard conduct. In fact, denial of all recovery when only a small role was played by the substandard behavior of the victim could only engender disdain for such a system as grossly unfair and lead to the development of various devices to circumvent such a result. And this, as we have seen, is exactly what happened.

But if the reason we consider victim fault is at least in part to assist in determining the initial question of whether the defendant had any responsibility to protect such a victim, then the unfairness of an "absolute bar" rule is not so evident. In some instances, we may conclude that the defendant's responsibility should extend to the protection of a victim against his own carelessness. In that event, it would be anomalous to announce that even though the defendant was required to protect the victim against his own carelessness, that same carelessness serves to bar or reduce the victim's recovery. On the other hand, a victim's behavior may have created a situation such that we judge the defendant owed him no protection at all. In such an instance, it would be unfair to the defendant *not* to announce that there is no recovery and to conclude instead that there should be recovery at a reduced amount.[31]

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dant is also involved, to which the victim has *contributed*. *See* RESTATEMENT (SECOND) OF TORTS, § 463 (1965). The result is harm caused in part by the defendant's conduct and in part by the conduct of the victim himself. The harshness of the rule is not evident until an additional rule is posited: the contributing substandard behavior of the victim will totally bar any recovery in his favor, no matter how large or small the contribution may have been.

Contributory negligence has come to be understood as the combined result of both rules, so that it expresses not only the notion of contributing fault but also the absolute bar to recovery. Thus, we do not generally consider "comparative negligence" as included under the heading of "contributory negligence," though clearly it should be. Comparative negligence describes a set of circumstances under which substandard behavior of the claimant has contributed to his ultimate harm, and presupposes that there is substandard behavior on the part of the defendant as well. Under a comparative negligence principle, only the rule as to the consequences of the victim's fault is changed, so that such fault is no longer an absolute bar but only a mitigating factor of varying proportions.

31. There are a number of cases in which victim fault must be considered in this light, *i.e.*, as an initial determination of the defendant's duty. The judge must determine, very often at the stage of a request for a directed verdict, whether the conduct of the defendant when combined with the conduct of the plaintiff has created a situation in which the law would be willing to impose responsibility on the defendant. It is

The discussion of contributory negligence versus comparative negligence, then, is only fruitful after we have grasped the basic role of victim fault. We cannot decide "how much" to "count" a plaintiff's conduct against him until we have defined those cases in which we shall consider it at all.

VICTIM FAULT AND THE DUTY/RISK ANALYSIS

The approach which Louisiana ultimately has adopted in considering victim fault and other factors with reference to the scope of defendant's duty has come to be known as the duty/risk analysis.[32] This analysis, and indeed modern Louisiana tort law, was introduced in a 1962 case, *Dixie Drive It Yourself System v. American Beverage Co.*[33] Plaintiff had leased its vehicle to a lessee whose employee encountered defendant's unlawfully parked truck as he proceeded along a four-lane highway. The lessee's employee erred in thinking that the truck, which was stationary, was merely moving slowly. When he realized the situation, any attempt to avoid it by moving into the other lane was blocked by traffic. In his attempt to stop on wet pavement, the lessee's employee skidded into the truck, causing damage to plaintiff's vehicle.

The court of appeal had dismissed the claim against the defendant on the ground that whatever negligence might have been committed had become "passive" and was no longer the "proximate

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essential that the court examine victim fault in this context and not abandon the matter to the jury for such consideration as it may deem appropriate. There are cases in which the law should announce a policy of extending the defendant's duty to protect the careless plaintiff, and at the other end of the spectrum there are those cases in which it should not hold the defendant responsible at all for the situation created by a plaintiff. The law is not indifferent to the result in such cases, and it should not permit the jury to weigh victim fault and the defendant's duty in whatever manner it may choose.

32. Victim fault is by no means the only factor to be considered in such an analysis. The process of determining whether the defendant's duty extends to protect the plaintiff against the precise risk incurred is one of the most challenging and complex decisions in the field of tort law. In addition to the victim's own conduct, the court will want to consider ease of association between the defendant's conduct and the harm (or foreseeability of the risk); administrative considerations focusing upon the predictability of future decisions based on the scope of responsibility outlined in the present case; economic considerations; the specific activity of the defendant, and other pertinent factors, such as the scope of responsibility of public defendants. The factor of victim fault is singled out for treatment in this article because of its importance in the discussion of comparative negligence. For a more detailed and erudite discussion of the analysis generally, *see* Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970); Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973); Comment, *Proximate Cause in Louisiana*, 16 LA. L. REV. 391 (1956).

33. 242 La. 471, 137 So. 2d 298 (1962).

cause" of the damage to plaintiff's vehicle.[34] The supreme court rejected the proximate cause analysis, preferring to approach the problem by considering whether the statutory duty applicable to the defendant's conduct would extend its protection to the harm—a harm produced in part by the conduct of defendant's employee and in part by the conduct of the lessee's employee. Concluding that the duty was intended to protect against harm caused in part by inattentive following drivers, the supreme court reversed the lower courts. The duty/risk analysis was born in Louisiana, and a strengthened means for control of a jury was available when needed.

Although in *Dixie* the conduct of the driver of the damaged vehicle was not to be imputed to the plaintiff-owner, and for that reason contributory negligence was not placed squarely in issue, nevertheless the seed was planted for what was to come. Somewhat timidly at first, Louisiana appellate courts began to view the plaintiff's own conduct as one of the factors to be considered under the newly developed duty/risk analysis. In the earliest cases, the court often could have rested its decision on the simple observation that the victim was careless and thereby could have avoided the knotty legal question of the scope of the defendant's duty. But in many instances, the court observed that the defendant's duty did not extend to the protection of the plaintiff against his own substandard conduct.[35]

Finally, in a group of decisions at the supreme court level, the technique of making a preliminary determination of the extent of defendant's duty in the face of plaintiff misconduct reached its full maturity. In *Pence v. Ketchum*,[36] the court dealt with a situation in

34. 128 So. 2d 841 (La. App. 4th Cir. 1961).

35. *See* Muse v. Patterson & Co., 182 So. 2d 665 (La. App. 1st Cir. 1965); Dartez v. City of Sulphur, 179 So. 2d 482 (La. App. 3d Cir. 1965); Martin v. State Dep't of Highways, 175 So. 2d 441 (La. App. 4th Cir. 1965).

36. 326 So. 2d 831 (La. 1976). The supreme court returned to the problem in a very recent case which will no doubt be termed a "retreat" from *Pence*, but which is in fact further illustration of the flexibility of the duty/risk analysis in weighing victim fault. In *Thrasher v. Leggett*, 373 So. 2d 494 (La. 1979), plaintiff entered defendant's bar, consumed a good number of drinks, and began harassing his estranged wife and her companion. He was requested to leave and did. He returned and, though visibly intoxicated, was served additional drinks by defendant's employees. He began threatening his wife again and was finally escorted to the door. He resisted by attempting to throw a punch at the bouncer, who warded off the blow with his arms. Plaintiff lost his footing and fell down the steps at the door, breaking his ankle. Plaintiff brought suit for his injuries, citing *Pence* and alleging that defendant had breached the statute which prohibits serving liquor to intoxicated persons. The trial court granted plaintiff a judgment, but the appellate court reversed. The supreme court was clearly uneasy with the reading which the trial court had given to *Pence* and opined that both *Pence* and the earlier decision of *Lee v. Peerless Insurance Co.*, 248 La. 982, 183 So. 2d 328 (1966), which was directly contrary on similar facts, were "in part correct and in part

which a bar patron was injured when she was struck by an automobile after being ejected from the bar in an intoxicated condition. The lower courts had held that the petition failed to state a cause of action, relying upon an earlier decision on very similar facts.[37] The court noted the violation of both statutory and non-statutory duties imposed upon the bar owner. It also recognized that many courts would conclude that the plaintiff's own intoxication, not defendant's conduct, was the "proximate cause" of the harm. But the court announced its preference for its own *Dixie*-brewed analysis. It then proceeded to make inquiry as to whether the duty imposed upon the defendant could properly be regarded as one which spread its protection even to a risk that was produced in part by the bar owner's conduct, in part by plaintiff's own conduct, and in part by the automobile driver's conduct.

When the question of barring plaintiff's recovery upon a showing of contributory negligence was reached, however, the court failed to draw the logical conclusion that if defendant's duty was to protect plaintiff against her own carelessness, then contributory negligence should not be a defense. Rather, it resorted to the doctrine of last clear chance so as to relieve plaintiff of the consequences of her own negligence. The same result was achieved, but by way of an awkward approach.

Justice Dixon, although concurring in the result, made the incisive observation that the majority's disposition was laudable but unnecessary:

> The duty-breach-of-duty approach adopted by this court and well discussed by the majority opinion negates the need for inquiry into the doctrines of contributory negligence and last clear chance. The proper test is whether the duty imposed on this

incorrect." 373 So. 2d at 496. And the supreme court "overruled" *Pence* to the extent that it was in conflict with its present decision in *Thrasher*.

The court seemed to choose a rationale very close to the former "proximate cause" approach in reaching its decision. It said:

> There is a real element of contributory negligence implicit in the situation. There is therefore no need to consider the bar owner's conduct under a duty-risk analysis. . . . Plaintiff's injury did not result from defendant's failure to prevent plaintiff's injury, but rather from plaintiff's own aggressive, violent behavior. . . . We conclude therefore that plaintiff's injury was caused not by a breach of duty by the bar owner or his bouncer but rather by plaintiff's own obstreperous behavior.

373 So. 2d at 496-97. Rather than overruling *Pence*, it appeared that the court was simply further defining the duty it first announced in *Pence*. The duty not to serve liquor to intoxicated persons extends to some, but not all, risks. A risk such as this one—almost wholly created by the victim's own conduct—is one which is beyond the protection of that duty. Accordingly, defendant, as to this plaintiff and this risk created by such conduct, has no duty of protection.

37. Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966).

> defendant, whether statutory or non-statutory, is designed to protect this plaintiff (in her intoxicated condition) from the risk to which she was exposed. This standard includes the protections provided by the above doctrines.[38]

Shortly thereafter, Justice Dixon had an opportunity to address the issue and followed his own advice. In *Cates v. Beauregard Electric Cooperative, Inc.*,[39] recovery was sought on behalf of a sixteen-year-old boy who suffered serious injuries due to an electric shock he received while climbing one of the defendant's utility poles. Summary judgment in favor of the defendant was granted by the trial court and affirmed by the appellate court.[40] The supreme court agreed. Though the opinion is not completely unambiguous, it appears to suggest that the defendant was not at fault, *i.e.*, the situation created by plaintiff's conduct was one to which the defendant's duty did not extend. The unusual disposition of the case by way of summary judgment was thus appropriate.

In the three most recent decisions, the use of the duty/risk analysis to ascertain the importance to be attached to the victim's conduct is even clearer. In *Baumgartner v. State Farm Mutual Insurance Co.*,[41] a pedestrian was killed when struck by a vehicle, and his family sought damages from the driver's insurer. The accident occurred at dusk on a New Orleans city street. There was substantial evidence that the pedestrian was intoxicated and that the driver assumed that he was an ordinary pedestrian who could complete the crossing timely. The appellate court had relieved the insurer of any responsibility, apparently upon the basis that the pedestrian was contributorily negligent.[42] But the supreme court reversed, holding that contributory negligence was not available as a defense. Its opinion discussed the "higher standard of care" imposed upon the motorist than upon the pedestrian and the lack of "mutuality of risks" created by the conduct of the motorist and the pedestrian. The application of "last clear chance" to relieve plaintiff of the consequences of his negligence was unnecessary, since plaintiff's negligence was simply not a defense. The majority used the duty/risk analysis in *Baumgartner* to conclude that the defendant's duty extended to the protection of this plaintiff against his own carelessness and, therefore, contributory negligence was not a viable defense.

The same pattern of analyzing victim fault as a part of measuring the defendant's duty may be seen in *Boyer v. Johnson*[43] and *Rue*

38. 326 So. 2d at 838 (Dixon, J., concurring).

39. 328 So. 2d 367 (La. 1976).

40. 316 So. 2d 907 (La. App. 3d Cir. 1975).

41. 356 So. 2d 400 (La. 1978).

42. 346 So. 2d 277 (La. App. 4th Cir. 1977).

43. 360 So. 2d 1164 (La. 1978). *See* Note, *Abrogation of the Contributory Negligence Bar in Cases of Disparate Risk*, 39 LA. L. REV. 637 (1979).

v. State Department of Highways.[44] In *Boyer*, a corporate officer had hired a fifteen-year-old boy to drive a delivery van. The boy had a driver's license, but various state statutes prohibited the employment of a minor to drive a vehicle for commercial purposes or to work around machinery. Shortly after his employment, the boy lost control of the van while making deliveries and was killed in the resulting collision with a tree. The father sought recovery for his son's death against the defendant executive officer, alleging the violation of the child-labor statutes.

The supreme court first determined that the statute relating to driving of employment vehicles by minors, if violated, envisioned a cause of action by the father. Then the court concluded that since the boy's death due to his inability to handle the vehicle was one of the evils the legislature was trying to avoid in passing the statute in question, the child's inability could not be pleaded as a defense of contributory negligence. Again, the duty/risk analysis produced the result that the standard of care imposed upon the defendant included protection of certain persons (minors) against the consequences of their own carelessness.

Finally, in *Rue*, the court was faced with another one-car accident in which plaintiff's vehicle left the traveled roadway, struck a rut on the shoulder of the highway, and overturned. She sought damages for her injuries against the Department of Highways, which she alleged had maintained the shoulder of the road in an unreasonable fashion. Relying upon earlier decisions, the Department contended that its responsibility extended only to those who might find themselves on the shoulder of the road due to an emergency not of their own creation. Both lower courts had held that the Department was negligent, but that the contributory negligence of plaintiff was a bar to her recovery.[45] The supreme court reversed on the basis that it was the responsibility of the Department to protect against the "inadvertence" or substandard conduct of drivers who thereby found themselves traveling on the shoulder. Thus, it held that the contributory negligence of the plaintiff was not a bar to recovery under the circumstances.

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44. 372 So. 2d 1197 (La. 1979). There is no indication that analysis of victim fault as one of a number of factors in determining the duty of the defendant under the circumstances changes in any way the burden of proof on the issue. Presumably defendant has the burden of coming forward with evidence on the issue and must persuade the court of its existence. But then the court has the burden of deciding what legal consequences should be attached to the proven negligence in the case at hand.

45. The appellate and trial courts relied heavily upon *Hopkins v. Department of Highways*, 167 So. 2d 441 (La. App. 1st Cir.), *cert. denied*, 246 La. 885, 168 So. 268 (1964), which was overruled in the supreme court opinion.

These three decisions—*Baumgartner*, *Boyer*, and *Rue*—are remarkable departures from the rule that the contributory negligence of a plaintiff will constitute an absolute bar to recovery. Thus, we can only say that sometimes plaintiff's contributory negligence will absolutely bar recovery, and sometimes it will not. But the decision as to whether it will or will not has clearly moved from neatly-defined categories of exceptions (last clear chance, momentary forgetfulness, sudden emergency, and the like) into the broad consideration of whether defendant's duty should as a matter of law extend to the protection of a careless plaintiff. If various policies of the law require that it should so extend, then contributory negligence should not be a bar to recovery; otherwise, the very policies of the law that dictated the scope of defendant's responsibility would be defeated.

The same pattern may be detected in the so-called strict liability cases. It appears that in defining the scope of protection afforded by the standard of strict liability applied to certain defendants,[46] our courts have determined that only certain degrees of victim fault will constitute an absolute bar. This is another way of stating that the duty of such defendants extends to the protection of plaintiffs against their own garden-variety contributory negligence (which is then not a bar to recovery)[47] but not against more foolhardy activity (which then may be a bar).[48]

THE CO-EXISTENCE OF COMPARATIVE NEGLIGENCE AND THE DUTY/RISK ANALYSIS

We are now in a position to describe those cases in which the duty/risk analysis will assist in delineating the role to be accorded to victim fault. This process will in turn define the proper role of comparative negligence.

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46. Such defendants include those alleged to be liable for harm caused by defective products, by things in their custody, LA. CIV. CODE art. 2317, by their children, LA. CIV. CODE art. 2318, or by their animals, LA. CIV. CODE art. 2321.

47. *See* Herbert v. Maryland Cas. Co., 369 So. 2d 708 (La. 1979) (Tate, J., concurring) *denying cert. to* No. 12,347 (La. App. 1st Cir.). Justice Tate offered the opinion that contributory negligence, as distinguished from assumption of the risk, should not be considered "victim fault" in strict liability cases. *See also* Khoder v. AMF, Inc., 539 F.2d 1078 (5th Cir. 1976) (contributory negligence not a defense in products liability action in Louisiana); Robertson, *Manufacturers' Liability for Defective Products in Louisiana Law*, 50 TUL. L. REV. 50 (1975).

48. Chappuis v. Sears Roebuck and Co., 358 So. 2d 926 (La. 1978) (products liability); Daniel v. Cambridge Mut. Fire Ins. Co., 368 So. 2d 810 (La. App. 2d Cir. 1979) (assumption of the risk may be defense to action for injuries inflicted by horse); Richards v. Marlow, 347 So. 2d 281 (La. App. 2d Cir. 1977) (high degree of victim fault defense in action brought under Civil Code article 2317).

For this purpose, tort cases may be divided into three broad categories: (a) those in which a defendant's duty extends to the protection of a plaintiff against his own carelessness; (b) those in which defendant is not liable because the plaintiff's conduct has produced a situation for which the law should not require a reasonably prudent person to prepare and respond; and (c) those that fall in neither category, in which the victim's fault and the defendant's fault may each be weighed in the balance.

(a) *Defendant's Duty Extends to Careless Plaintiffs*

Earlier comments have indicated a number of instances in which a defendant might be required to respond for risks produced in part by plaintiff's own substandard conduct. A motorist might be required to respond for injuries to a pedestrian despite the pedestrian's own careless conduct,[49] and perhaps especially so if the pedestrian is a child.[50] An employer who violates a child labor law in hiring a minor for certain work may be required to protect the child, in effect, against his own immaturity and negligence.[51] The Department of Highways might be required to respond for injuries caused in part by the "inadvertence" or negligence of a driver.[52] A golfer may be required to anticipate a child's carelessness on the golf course and thus may have to respond for injuries to the child in spite of such substandard behavior.[53] A bar owner may have to respond for certain harms traceable to a patron's voluntary intoxication.[54] The manufacturer of a defective product may be liable for a victim's injuries even in the instance in which the victim was himself contributorily negligent.[55] Examples could be multiplied.[56]

In many of these instances, a common factor may be observed. The defendant is a person or entity whose conduct exposes a good number of people to substantial risks of harm. The plaintiff is a person whose conduct exposes only himself to harm. If society had to

49. Baumgartner v. State Farm Mut. Auto. Ins. Co., 356 So. 2d 400 (La. 1978).

50. Dufrene v. Dixie Auto Ins. Co., 373 So. 2d 162 (La. 1979).

51. Boyer v. Johnson, 360 So. 2d 1164 (La. 1978).

52. Rue v. State Department of Highways, 372 So. 2d 1197 (La. 1979).

53. Outlaw v. Bituminous Ins. Co., 357 So. 2d 1350 (La. App. 4th Cir. 1978).

54. Pence v. Ketchum, 326 So. 2d 831 (La. 1976). *But see* Thrasher v. Leggett, 373 So. 2d 494 (La. 1979). See note 36, *supra*.

55. *See* Khoder v. AMF, Inc., 539 F.2d 1078 (5th Cir. 1976), and Louisiana authorities cited therein.

56. Certainly the courts might want to continue to hold as a policy matter that victim fault should not be considered in mitigation of damages when an intentional tort on the part of the defendant is proven. And, as to various types of cases based upon strict liability, it may be wise to protect the victim against certain types of misconduct of his own creation, if the risk of his misconduct is one of the types of occurrences at which the rule of strict liability was directed in the first place.

put a value on these two pieces of conduct (both potentially "negligent"), it no doubt would rate the defendant's conduct as more undesirable than the plaintiff's. At a point at which the imbalance becomes extreme, we may simply say that we will ignore altogether plaintiff's conduct, albeit careless. Such a serious lack of "mutuality of risks" prompts the legal conclusion that defendant must protect the plaintiff against his own carelessness.[57] The duty/risk analysis should continue to assist us in ferreting out such cases and announcing such a conclusion where appropriate.[58]

(b) *Plaintiff's Conduct Creates Situation as to Which Defendant Has No Duty of Protection*

Every first-year student in torts learns that if the defendant has no duty toward the plaintiff, then he has no liability. Sometimes plaintiff's own conduct creates a situation in which defendant has no duty and, therefore, no liability. But too often such cases are treated as "contributory negligence" cases when in fact they are "no defendant duty" cases.

Consider the situation of a grocery-store operator and his patrons. There is certainly a non-statutory duty imposed on the operator to keep his aisles reasonably clear of obstructions such as boxes, displays, and foreign objects. Suppose that he has done so and has only an occasional overflow box or display well against the side of the aisle so as to present no hazard to the ordinary shopper.

57. On this point, see the excellent student note at 39 LA. L. REV. 637 (1979). Consider also, for example, *Kelly v. Messina*, 318 So. 2d 74 (La. App. 4th Cir. 1975), in which the court holds that the contributory negligence of an eleven-year-old bicyclist will not constitute a bar to recovery, and indicates that the duty of a motorist extends to the protection of such a child against his own carelessness. And consider *Paxton v. Rallard*, 289 So. 2d 85 (La. 1974), in which the court implies that the contributory negligence of a patron in a self-service grocery is not a bar because victim carelessness is within the scope of protection afforded by a defendant's duty in that instance. "To put contributory negligence at issue, however, is not to deny recovery. A finding of contributory negligence, as a fact, may be made only within the framework of the mutual rights and obligations of a storeowner and his patrons." *Id.* at 88. *See also* Fontenot v. Fidelity General Ins. Co., 185 So. 2d 896 (La. App. 3d Cir. 1966) (duty of taxi driver arguably extends to the protection of a passenger who might have been negligent in attempt to re-close loose or opening door on taxi).

58. Even jurisdictions with long experience in the comparative negligence game have reached the conclusion that it ought not to apply in certain instances in which the defendant's responsibility is fairly pervasive. In *Hartwell Handle Co. v. Jack*, 149 Miss. 465, 115 So. 586 (1928), it was held that the Mississippi child labor statute—even though passed after the comparative negligence statute—would not permit the reduction of a child's claim on the basis of his own negligence. *Contra*, Presser v. Siesel Constr. Co., 19 Wis. 2d 54, 119 N.W.2d 405 (1963) (plaintiff's damages ought to be reduced even though the defendant violated the safe-place statute).

But suppose that a patron, finishing an animated conversation with another shopper, is taking a few steps backward down the aisle and falls over the box.[59] Should it not be said that although the operator has a duty to protect his patrons, he has no duty to protect this particular patron against the product of his own conduct?[60]

A recent case affords another example. A car driven by defendant approached an intersection and slowed almost to a stop to make a right turn. Finding some children in the path of the proposed right turn, the driver apparently changed his mind and began accelerating the car forward. Unknown to the driver, one of those children grabbed the handle of the car door on the passenger side, seeking to enter. The driver's eyes were apparently on the road ahead and he failed to detect the child in the few seconds in which the child grabbed the door handle and ran alongside the car. The car struck a hole, and the child was injured by being thrown into the side of the car. The trial court denied recovery, and plaintiff appealed on the ground that the trial court had found the child to be contributorily negligent but had not applied the doctrine of "last clear chance." The court of appeal affirmed the result, noting that last clear chance only applied to absolve a plaintiff of the consequences of contributory negligence in cases in which the defendant was negligent. The court held that defendant was not negligent under these circumstances, since the child's conduct had created a situation against which the reasonable driver could not be expected to protect him.[61]

Or consider the somewhat older case of *Dartez v. City of Sulphur*.[62] The city had permitted a parking meter, bent over the sidewalk by contact with vehicles, to remain as a partial obstruction of the sidewalk. Plaintiff had several times skirted the obstruction on previous trips. However, on the occasion in question, he failed to see a piece of wire on the sidewalk. He tripped and fell across the bent parking meter, sustaining serious injuries "to his private parts." The trial court denied recovery on the basis of plaintiff's contributory negligence. The appellate court agreed with the result, but used the duty/risk analysis to conclude that plaintiff's conduct (and the conduct of the unknown person who dropped the wire) created a situation against which the defendant did not have to protect.

[P]laintiff's injuries resulted because when he fell the bent post

59. In another article, Professor Malone has such a patron falling backwards down a stairway. Malone, *Comments on Maki v. Frelk*, 21 VAND. L. REV. 930, 933 (1968). Falling over a box will do just as well.

60. The similarity between such a case and the granddaddy of all contributory negligence cases, *Butterfield*, is remarkable. See text at notes 1-4, *supra*.

61. Dunn v. Bolden, 372 So. 2d 785 (La. App. 2d Cir. 1979).

62. 179 So. 2d 482 (La. App. 3d Cir. 1965).

> happened to be in his way. The duty imposed upon the city not to obstruct the walkway by the bent pole did not include within its scope the protection of those who might need the space occupied by the bent pole in order to fall free of it and thus to hit the sidewalk instead, nor to guard against resulting harms so highly extraordinary as to be unforeseeable within reason.[63]

The same analysis may be applied to strict-liability cases. For instance, defendant had permitted the substructure of an old pier to remain jutting out into a lake, leaving a skeleton of two-inch metal pipes exposed above the water. Plaintiff's thirteen-year-old daughter attempted to "tightrope" down the pipes and was injured when she slipped. Liability was urged upon several grounds including article 2317 of the Civil Code. The appellate court reversed the trial court's award in favor of the plaintiff.[64] Though the court discusses the case in terms of contributory negligence or assumption of the risk, it is equally plausible to argue that the child's conduct had created a situation such that defendant could not be asked to protect against it.

Again, examples and hypotheticals could be multiplied.[65] All of these cases seem to share a common thread. The course of conduct chosen by the defendant exposes some persons in society to some risks, as all conduct inevitably does. But the course of conduct chosen by the victim exposes the victim himself to substantial harm, which he could protect against with only a minimal alteration of his own conduct.[66] The defendant, on the other hand, might protect such a careless plaintiff only by the expenditure of substantial sums of

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63. *Id.* at 485.

64. Richards v. Marlow, 347 So. 2d 281 (La. App. 2d Cir. 1977).

65. A good number of the cases decided on the basis of assumption of the risk will probably fall into this category. The patron in a baseball park, seeing some unscreened area and some screened area and choosing to sit in the former, cannot be heard to complain when struck by a foul ball that defendant was negligent in failing to screen the whole seating area. Plaintiff's own conduct in most instances of that type should not be a factor in reduction of damages. Rather, it was of such a nature as to eliminate any duty that the defendant might have had toward such a plaintiff. Some authorities have referred to this as "primary" assumption of the risk. *See* Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); F. HARPER & F. JAMES, THE LAW OF TORTS § 21.1 (1956 & Supp. 1968).

There are also some good examples in master/servant cases not falling under the workers' compensation act. *See, e.g.*, Stigler v. Bell, 276 So. 2d 799 (La. App. 4th Cir. 1973) (worker jammed point of pin in top of spray paint can which became clogged and paint sprayed in his eyes; "no negligence" on part of persons who provided can).

66. This is often suggested as a factor to be taken into account in determining whether to apply a standard of strict liability to a defendant in the first place. Wade, *On The Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973). The choice of a more stringent and perhaps expansive duty for a defendant is, of course, the type of inquiry which is made in the duty/risk analysis.

money in order to take burdensome precautions that would be needed only in those rare instances in which plaintiff's conduct is foolhardy. It is not surprising that we conclude that defendant should escape liability on the simple basis that he was not required to guard a plaintiff against an extreme risk, largely if not wholly of plaintiff's own creation.[67]

(c) The Fault of Both Plaintiff and Defendant is Considered

There are, to be sure, a good number of cases that will fall in neither of the foregoing categories. The law is not certain that the victim's fault should be wholly ignored or that it should be held to create a situation as to which defendant has no duty of protection. In such an instance, it is appropriate that the jury or other fact-finder be permitted to consider the conduct of both and accord to each the responsibility that it thinks proper.

It is likely that the great majority of such cases will arise out of ordinary traffic accidents, which are notoriously difficult to analyze. The comments of the late Professor Leon Green on the subject made some fifty years ago bear repeating:

> Probably the general traffic cases—pedestrian and motorist, motorist and motorist—furnish by far the largest number of cases of the current day. And doubtless also legal theory is here most out of joint. . . . The courts find themselves struggling hopelessly under this mass of cases. The licenses required for driver and car, speed laws, lights and brakes, rules of the road, traffic cautions and signals, together with an enormous increase of traffic officers do not appreciably cut down the number of injuries, the risks, or the work of the courts. As though there

67. For the sake of simplicity, all of these examples involve a single careless plaintiff and a single defendant whose duty may or may not extend to the protection of such a plaintiff against the consequences of his own carelessness. Matters may become more complex with multiple defendants with varying duties, but the principle need not be abandoned. Assume that Minor, illegally employed by Employer to drive a truck, negligently collides with another vehicle, also negligently driven by Driver. Assume further for purposes of this example that such illegal employment would permit him to sue in tort rather than workers' compensation. If Minor sues both Employer and Driver, it might be concluded that Employer's duty extends to the protection of Minor against his own carelessness but that Driver's duty is not so extensive.

How should the loss be apportioned among the three participants? The more extreme position would be to hold the Employer liable for the entire damage to Minor, without right of contribution from Driver, on the theory that the Employer's duty extends to the protection of both Minor and Driver from the consequences of Minor's illegal employment. This is probably more protection than would be suitable under the applicable statute.

> were no other way to do the job, the courts continue to inquire into the "fault" of the respective parties. In quantity of litigation, and also in the legal theories applicable to the particular case, traffic litigation is reaching totals far in excess of the enormous master-servant litigation of a generation ago.
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> . . . What court or group of laymen can so weigh faults as to pass with any precision upon the conduct of two swiftly moving automobiles, or two human beings equally bent on getting every second out of the day? And what difference does it make if they could?[68]

Certainly comparative negligence is preferable in such cases to contributory negligence. But an equal-division rule might ultimately prove superior to comparative negligence. After the cases in categories (a) and (b) are dealt with according to the duty/risk analysis, we are likely to find that the remaining matters are ones in which mutuality of risk seems to be present. Each party involved will have exposed the other or others to similar degrees and frequency of risk. The cases are likely to be analogous to those described by Professor Green in which "fault" is ephemeral in any event. And it may then be simpler, and certainly more efficient from a judicial standpoint, to adopt by legislation an equal-division rule among the financially responsible entities rather than a percentage rule.[69]

THE DUTY/RISK ANALYSIS AND ACT 431 OF 1979

Nothing in the new comparative negligence statute (Act 431 of 1979) states, or even indicates, that the duty/risk analysis cannot

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A more reasonable solution might be to submit the question to a jury (or other fact-finder), asking that the "degree" of fault of each party be determined. If Minor is found to be 10% at fault, Driver 20%, and Employer 70%, and Minor's damages are $100,000, the court might enter judgment in favor of Minor against Employer in the amount of $80,000 and against Driver in the amount of $18,000. The judgment against Employer is derived from the fact that, although Employer and Minor are together responsible for 80% of Minor's damages, Employer must protect Minor against the consequences of his own carelessness. But as to Driver, some mutuality of risk is present and Driver need not protect Minor against his own carelessness. Driver is entitled to a reduction in the amount payable according to Minor's negligence, *i.e.*, a 10% reduction in the $20,000 Driver would otherwise have to pay.

Act 431 appears to authorize such a procedure in its statement that "[t]he court shall then enter judgment in conformity with the jury's answers to these special questions and *according to applicable law*." 1979 La. Acts, No. 431, § 2, *amending* LA. CODE CIV. P. art. 1811 (emphasis added).

The concept of comparative contribution among defendants is discussed more fully elsewhere in this symposium, *see* Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 LA. L. REV. 373 (1980).

68. Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 277-78 (1929).

continue to be employed in the fashion described in the foregoing pages. In fact, the introductory clause to the basic comparative negligence provision reads: "*When contributory negligence is applicable to a claim for damages*, its effect shall be as follows: . . . ."[70] Nowhere does the Act answer the question of when contributory negligence *is* applicable to a claim for damages. Based upon the previous discussion, we can at least say when it is *not* applicable:

(a) contributory negligence is not applicable when defendant is negligent[71] and his duty extends to the protection of plaintiff against his own carelessness. Such cases correspond to category (a) previously discussed.

(b) contributory negligence is not applicable when defendant has no duty to protect plaintiff.[72] Some such cases will be found in category (b) previously discussed.

In each instance, the duty/risk analysis is the proper vehicle by which to determine the issue of applicability of contributory or comparative negligence. This inquiry must be completed, in fact, before the tenets of Act 431 can be used. If defendant is not liable because plaintiff's conduct has created a situation such that defendant could not possibly be expected to protect him against such risks, then Act 431 is inapplicable. No recovery, even at a reduced level, would be

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69. Consider the suggestion in *Daly v. General Motors Corp.*, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978), that an arbitrary fractional reduction of plaintiff's recovery without reference to "degree of causation" or "degree of fault" might be the most efficient manner of handling such cases.

For an instance in which a Louisiana court adopted, in effect, an equal-division rule in a traffic case, *see* Scott v. Behrman, 273 So. 2d 661 (La. App. 4th Cir. 1973). The outcome of the decision is a sort of imputed comparative negligence rule, with equal shares between those responsible.

70. 1979 La. Acts, No. 431, *amending* LA. CIV. CODE art. 2323 (emphasis added). It is probable that the proponents of the legislation did not have the thesis of the present article in mind when choosing the phrase "when contributory negligence is applicable to a claim for damages" to introduce the new comparative negligence principles. It is more likely that they meant to retain those present instances in which contributory negligence is not a defense (intentional torts, strict liability actions) and to provide that Act 431 would not apply in such cases. No doubt they meant to eliminate the absolute bar to recovery in all other cases. It is significant, however, that the language of the bill finally accepted by the legislature differs from that proposed in previous comparative negligence bills which failed to pass, in which contributory negligence was specifically *abolished* as a defense. *See* La. S.B. 563, 1st Reg. Sess. (1975); La. S.B. 511, 35th Reg. Sess. (1972); La. H.B. 820 & 1081, 31st Reg. Sess. (1968); La. S.B. 396, 31st Reg. Sess. (1968).

71. *I.e.*, has engaged in substandard behavior when measured against the standard deemed applicable to his conduct.

72. *I.e.*, has not engaged in substandard behavior when measured against the standard deemed applicable to his conduct.

just. On the other hand, if defendant's duty extends to the protection of persons such as this careless plaintiff, Act 431 is equally without application. Plaintiff should not under those circumstances be expected to suffer a reduction in his recovery. Thus, the sophistication reached at this point with the duty/risk analysis will continue to eliminate those instances in which the absolute-bar rule was most troublesome, and it will also protect defendants against liability where none should attach even at a reduced level.

An alternative interpretation of Act 431 seems undesirable. If the courts refuse to address the basic question of *whether* contributory negligence is applicable to the case, and choose rather to submit all questions of victim fault to juries, the result is virtual abandonment to juries of critical legal policy questions and surrender of all hope of uniformity in the law. We will have transformed duty questions into damage questions; we will have replaced legal issues with dollars-and-cents estimates.

Casting more and more legal questions into the laps of jurors is a practice of doubtful validity. Jurors should not be expected to act as "little lawyers." Certainly this is the case when there are accusations that juries no longer adequately present a cross-section of the community in many instances. Special danger is present in Louisiana where the direct action statute[73] and various themes of strict liability could inexorably lead to broad grounds of recovery at substantial sums. We have already given to juries in Louisiana the formerly legal questions of the standard to be applied to a defendant in a products liability case[74] and those applicable to invitees, licensees, and trespassers.[75] If, on the supposed authority of Act 431, we yield to the jury traditional control of the judge over the vital issue of the scope of the defendant's duty, it is likely that we will regret it. The jury, supposed to be the servant of the judge and the law and representative of the community on matters of factual dispute, will become master of the law. Juries function best when their participation is limited, by the use of proper controls, to those issues of fact

73. LA. R.S. 22:655 (Supp. 1962).

74. To the extent that we permit the jury to determine whether a product is "defective" or not, we permit it to choose the standard applicable to the defendant's conduct. If the jury finds that the product is "defective," then a strict liability standard is applied. If the jury finds that the product is not "defective," then a negligence standard applies.

75. If we now find that the distinction among these categories is "of little help," as the court did in *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367, 370 (La. 1976), and that the care owed to entrants on land is merely a question of reasonable conduct under the circumstances, we no longer have much control of such cases. The jury must decide "reasonableness" without any limitations by the judge as has previously been the case according to the status of the entrant.

appropriately within their abilities. To ask them to go beyond such issues and answer for us those questions as to which they have no training is unfair to them and unfair to society.

CONCLUSION

This elegy in support of the duty/risk analysis and its harmonious co-existence with the proposed comparative negligence system should not be misconstrued. The analysis, conceived by Leon Green and nurtured by Wex Malone, David Robertson, and others, has reached an enviable plateau of sophistication. It is a device by which judges[76] may define the defendant's responsibility and may candidly express the reasons for the definition. It avoids the shibboleths of "proximate cause" and "last clear chance" and others of the same ilk.

The duty/risk analysis does not dictate a result always in favor of plaintiffs or always in favor of defendants. It has been used to exclude wholly certain risks from the defendant's responsibility because of plaintiff's substandard conduct. It has been employed to include wholly certain risks produced in part by plaintiff's substandard conduct.

It remains not a rule, but an analysis or method of reasoning, affording judges the flexibility needed to make important policy decisions that a complex society demands. The analysis need not be decisive in every case; indeed, in some cases it merely permits the conclusion that the law is indifferent to the particular result and defendant's duty may just as well extend to the risk incurred by the plaintiff as not.

But the analysis need not be, and should not be, discarded because we choose a comparative negligence concept. Our system is likely to produce more just results if the duty/risk analysis and comparative negligence complement each other. And it is this objective that the author has sought to foster in these ruminations.[77]

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76. Trial judges may do so by the exception of no cause of action or the directed verdict now available under article 1810 of the Code of Civil Procedure; appellate judges may do so by review of facts and law and reversal in appropriate cases.

77. How could one write an article on Louisiana tort law and owe such an obvious debt of scholarly contribution to Professor Emeritus Wex S. Malone without using the word "ruminations"? *See* Malone, *Ruminations on Group Interests and the Law of Torts*, 13 RUTGERS L. REV. 565 (1959); Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956); Malone, *Ruminations on Dixie Drive It Yourself versus American Beverage Company*, 30 LA. L. REV. 363 (1970).